No. 14581

United States
COURT OF APPEALS
for the Ninth Circuit

CLIFFORD G. MARTIN, Doing Business as Martin Music Company,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon

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ARGUMENT

I.

The Appellant's business is specifically exempted from the application of Ceiling Price Regulation 34 by the provisions of the said regulation.

In order for Appellee to arrive at the conclusion urged by it in its brief, it must ignore the meaning of the words of the very regulation which it asserts the

Appellant violated. The fact that Ceiling Price Regulation (CPR) 34 was specifically applied in official interpretations and releases to a myriad of services other than the type of service which the Appellant rendered is not material in this case. The distinction between charges for the use of frozen food lockers or charges by radio and television repairmen and the charge exacted by the Appellant as a price for the publication of his recordings in coin operated music machines is obvious. The former have such a direct bearing on the cost of living of most Americans that the application of price regulations issued pursuant to the Defense Production Act of 1950 to them is not subject to much reasonable controversy.

An even greater distinction exists—one which Appellee has ignored. The many services which are not involved here were in official interpretations and releases of the Office of Price Stabilization (OPS) specifically brought within the coverage of CPR 34. The so called administrative interpretation apparently relied upon by Appellee in this case is found in two (2) letters set forth in Appellee's brief on pages 17 and 23. Both letters were written in response to letters from the Justice Department dated March 10, 1955, which was after the service of Appellant's brief in this case on Appellee's attorneys.

Such *post facto* expressions of administrative interpretation do not carry weight and are entitled to no more consideration than the argument of Appellee's attorneys in this case.

In the recent case of *Massy vs. United States*, 214 F. 2d 935 (8th Cir. 1954), the court at page 940 stated:

> "Certain so-called 'interpretations' of the regulation as applied to the controversy were urged upon the trial court as persuasive, if not conclusive. We think they did not have the usual attributes of interpretations. They were issued after this regulation ceased to be in effect and one of them was not issued until this action was being tried. They were not published in the Federal Register nor otherwise communicated to the defendant or other dealers similarly situated and cannot, we think, be accepted as reflecting an administrative practice. . . . What is said by the United States Court of Appeals for the District of Columbia in Fleming v. Van Der Loo, supra, [160 F. 2d 912], is here peculiarly apposite:
>
> " 'The Administrator's ruling here involved was in the form of a letter written in this particular case by a local enforcement officer. Technically it automatically became an official act of the Administrator by operation of a general procedural rule of his office. But it was not a published ruling, nor, so far as the record shows, was it public. It was not an administrative interpretation of long standing but was made after this controversy had arisen; was written two years after MPR 330 was issued, and was thereafter nullified by Amendment No. 5. Thus, it does not carry the great weight of presumptive validity which attaches to long-continued, consistent, published administrative rulings.'
>
> . . .
>
> "These so-called 'interpretations', in the circumstances here disclosed, were entitled to no more weight nor persuasiveness than the argument of counsel appearing in the case."

Even official interpretations of the OPS are not binding upon this court. The argument that such an ad-

ministrative interpretation of a regulation was binding was made in *Armour and Co. vs. United States,* 102 F. Supp. 987, 990 (U. S. Ct. Cls. 1952), where the court said:

> "The interpretation of a regulation or a statute is a proper function of this or of any other court."

In *Bowles vs. Simon,* 145 F. 2d 334, 337 (7 Cir. 1944), Mr. Justice Minton then a judge on the Court of Appeals for the Seventh Circuit in writing the opinion stated:

> "We do not accept the Administrator's view that he may promulgate a regulation and then place on it an interpretation which becomes controlling on the courts. The Administrator has not grown to any such stature. The courts may consider his interpretations and follow them, if correct, but the court is not bound to follow them. . . .
>
> "We think the District Court had a right to determine the meaning of these regulations for itself, although it could not, and did not, undertake to pass upon their validity. . . . Having made its own interpretation, the District Court was justified in rejecting the Administrator's interpretation of these regulations."

In the *Bowles Case* and in the *Armour Case,* the Court was considering official interpretations and not as here letters written by Appellee's officials for the sole purpose of supporting Appellee's case more than three (3) years after the alleged violations.

It is clear that the administrative interpretation of CPR 34 urged by Appellee is not binding upon this Court. Appellant has shown in his brief that his business was specifically exempted from the application of CPR 34.

2.

If the prices for furnishing music by means of coin-operated machines were within the contemplation of the General Ceiling Price Regulation and of Ceiling Price Regulation 34, the said prices and such services were exempted from the provisions of the said regulations by General Overriding Regulation 14.

Appellee has failed completely to answer Appellant's brief on this point.

Appellee once again urges an administrative construction which is supported only by the letters set forth in Appendix B of Appellee's brief, and which completely ignores the ordinary meaning of the words of GOR 14. Such an administrative interpretation relying as it does upon an unnatural and limited definition of ordinary words is both erroneous and unreasonable, and is clearly not binding on this court.

The distinction between the services rendered by those who rent their facilities for the active participation of their customers (such as operators of bowling alleys, golf courses, etc.) and one such as the Appellant who furnished music for the entertainment of the public is obvious, yet patently ignored by Appellee.

Appellant's discussion on the first point presented in this brief with respect to the persuasiveness of the administrative interpretations urged by Appellee is equally applicable with respect to the administrative interpretation urged by Appellee in the consideration of GOR 14.

As heretofore stated, such an administrative interpretation is entitled to no more weight than the argument of Appellee's counsel.

CONCLUSION

For the foregoing reasons the judgment of the trial court being contrary to the law should be reversed.

Respectfully submitted,

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By.....
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